Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	IB Docket No. 95-91
	)	GEN Docket No. 90-357
	)	RM No. 8610
Establishment of Rules and Policies for the	)	PP-24
Digital Audio Radio Satellite Service in the	)	PP-86
2310-2360 MHz Frequency Band	)	PP-87

REPLY COMMENTS OF THE MEDIA ACCESS PROJECT

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SUMMARY

As Media Access Project ("MAP") showed in its initial Comments, Digital Audio Radio Service ("DARS") has the potential to add to both the availability and diversity of programming, providing the public with additional national news, political, educational, and other informational listening options. However, without affirmative requirements to ensure such programming is available, the potential benefits of DARS are unlikely to be realized.

In their Comments, the DARS applicants fail to show that, in the absence of Commission action, they will provide public interest programming. Instead of solid commitments, the applicants merely offer vague and unenforceable statements of intent. Marketplace forces may enable implementation of new technologies, such as DARS, but the Commission must ensure that these technologies serve the public interest.

The DARS applicants also claim that the Commission's decision in *Subscription Video* precludes regulation of DARS licensees as broadcast entities, thereby avoiding the imposition of Title III public interest obligations. However, because DARS operators, like traditional broadcasters, use the public spectrum to provide programming services to the public, DARS must be regulated under Title III. In this connection, MAP urges the Commission to subject DARS licensees to public interest requirements similar to those imposed on broadcasters. As MAP demonstrated in its initial Comments, *Subscription Video* makes improper and illogical distinctions between services and the Commission should expressly overrule its decision in *Subscription Video*.

Some commenters allege that the imposition of public interest requirements would be "constitutionally problematic" in light of *Daniels Cablevision v. United States*, 835 F.Supp. 1

(D.D.Cir. 1993), *app. pending sub nom.*, *Time Warner Entertainment Co. v. FCC*, No. 93-5349 (D.C.Cir. filed Nov. 11, 1993). However, *Daniels* does not bar the Commission from imposing public interest obligations on DARS providers. The *Daniels* Court summarily dismissed the narrow non-commercial, educational set-aside for DBS providers, yet upheld PEG and leased access requirements imposed on cable systems. In any event, *Daniels* was wrongly decided for the reasons laid out in the Commission's own brief filed in the recent appeal of that case. It does not address, much less invalidate, the public interest obligations imposed under Section 25 of the 1992 Act (codified at 47 U.S.C. §335). The Commission can, and should, require that DARS operators provide educational and informational programming as a condition of their use of public spectrum.

Finally, the Commission should not allow the DARS applicants to hoard spectrum in excess of their actual needs. While the four DARS applicants would like the Commission to allocate the entire 50 MHz of available spectrum to them alone, the FCC should recognize a spectrum grab when they see one. As DARS technology has developed over time, spectrum needs have changed. As the Commission itself noted in the *NOPR*, the applicants' recent estimates differ widely, with channel capacity ranging from 11 to 32 channels, and spectrum needs from 10 to 50 MHz. Thus, the Commission should approach the applicants' estimated needs with great skepticism.

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REPLY COMMENTS OF THE MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these reply comments in the above referenced docket. Most parties, including MAP, have encouraged an optimistic vision of the possibilities offered by satellite DARS. Applicants and other supporters of this new technology have shown that it can benefit the public by serving unserved or underserved areas, and it may be able to provide programming for non-English speaking, minority, and ethnic audiences and listeners with specialized tastes.

But the DARS applicants are asking for both more and less of what is required. They each seek to obtain a huge 12.5 megahertz allotment of "beachfront property" spectrum. This is more than twice the spectrum space allocated to broadcast television stations. And at a time when other services are increasingly subjected to auctions, these applicants want their spectrum for free, in exchange for their promises to benefit the public interest.

Even more unsettling is that they seek to avoid all program regulations. Although they refuse to make concrete, enforceable promises as to the programming they will carry, they seek nonetheless to avoid any public interest requirements. Moreover, they seek to divert some of this free spectrum to provide highly lucrative "ancillary" services.

The Commission should be on the alert. It must classify DARS as a broadcast service, thereby requiring it to abide by Title III requriements. Failing this, and keeping in mind that

its "ultimate duty remains to ensure that the public interest is served," Comments of Media Access Project at 1, it should create specific broadcast-style public interest obligations. By no means can it allow DARS applicants to obtain more frequency bandwidth than is absolutely necessary to provide DARS service, and it cannot grant them their wish to provide ancillary services.

I. THE COMMISSION SHOULD IMPOSE PUBLIC INTEREST OBLIGATIONS ON DARS PROVIDERS.

Although DARS has the potential to add greatly to the availability and diversity of information sources, political and civic discourse, and other informational and educational programming, MAP Comments at 19, the approach advocated by the DARS applicants would let them fall far short of realizing this potential. Indeed, it would let them evade public interest requirements altogether. The applicants argue that they cannot be classified as broadcasters and are free from any concomitant public interest obligations. *See, e.g.*, Comments of CD Radio at 78-84 ("CD Radio Comments"). Moreover, they argue that the Commission should not impose public interest obligations as a matter of policy and that these obligations might not pass constitutional muster. *See, e.g.,* Comments of American Mobile Radio Corporation at 23 ("AMRC Comments"); Comments of Digital Satellite Broadcasting Corporation at 52 ("Digital Satellite Comments"); CD Radio Comments at 84-85.

DARS licensees cannot treat serving the public interest as purely voluntary. Instead, they should be classified as broadcasters and required to serve the public interest under Title III of the Communications Act. And even if not classified as broadcasters, MAP urges the Commission to impose obligations as a matter of policy which ensure that DARS licensees devote part of their capacity to such public interest uses as reasonable access and equal opportunities for national

political candidates, educational programming, discussion of issues of national importance, and compliance with the Commission's EEO requirements.

A. Public Interest Requirements Apply As A Matter Of Law Because DARS Licensees Are Broadcast Services.

The views of the DARS applicants concerning the appropriateness of imposing public interest requirements vary according to whether the proposed service is to be advertiser-supported or subscription-based. American Mobile Radio Corporation ("AMRC") concedes that it would be "reasonable" to apply public interest requirements, but only for advertiser-supported services. AMRC Comments at 23. It opposes as a matter of policy such requirements for subscription services. *Id.* CD Radio Inc. ("CD Radio"), citing *Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988), argues that a "subscription service offered by way of a scrambled signal is not broadcasting," and therefore should not be subject to any broadcast public interest obligations. CD Radio Comments at 82-83.[1]

But the law is not as straightforward as these applicants suggest. Subscriber-supported DARS services may well be subject to public interest obligations as a matter of law. As MAP noted in its comments, *Subscription Video* makes improper and illogical distinctions between services, and it should be overruled. MAP Comments at 15-18. Specifically, the Commission should not place reliance on the intent of the service provider, because the provider may alter

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[1]Both AMRC and CD Radio question whether such requirements would be constitutional in light of *Daniels Cablevision v. United States*, 835 F.Supp. 1 (D.D.C. 1993), *app. pending sub nom., Time Warner Entertainment Co. v. FCC*, No. 93-5349 (D.C. Cir. filed Nov. 11, 1993), even if they were applied only to advertiser supported DARS. AMRC Comments at 23; CD Radio Comments at 84 n. 202. MAP shows, *infra* at 7-9, that *Daniels* does not effect the constitutional status of such requirements.

its intent to evade certain regulations. *Id.* at 17. Neither should the Commission rely on the need for special decoding devices, since technology changes rapidly and what is a "special" device today may become widespread tomorrow. *Id.*

Instead, any service which receives a license to use part of the scarce public spectrum should be subject to public interest requirements. *Id.* at 13-15. The Commission itself has acknowledged this, saying that the government has greater powers to impose public interest programming on direct broadcast satellite service ("DBS") providers because "DBS providers use a portion of the scarce radio spectrum in order to distribute their programming..., and the number of orbital positions available for DBS satellites is limited." Opening Brief for the FCC and United States at 51, *Time Warner v. FCC*, No. 93-5349 and consolidated cases (D.C. Cir. 1995).

Furthermore, subscription-based direct broadcast satellite service ("DBS"), which may possibly be classified as non-broadcast by *Subscription Video* analysis, is hardly free from any and all Title III requirements. First and foremost, DBS applicants cannot even obtain a license unless they establish that they meet certain Title III requirements, such as that they are not aliens or held by aliens, are financially and technically qualified, and are of good character. 47 U.S.C. §§308, 309, 310. In the 1992 Cable Act, Congress expressed its intent to subject DBS providers to public interest requirements - regardless of the FCC's *Subscription Video* policy and without reference to whether they were subscription-based - including, at a minimum, the reasonable access and equal opportunities requirements of 47 U.S.C. §§312(a)(7), 315. *See* 47 U.S.C. §335. If DBS providers broadcast advertisements over their service, they must abide by the sponsorship identification requirements. 47 U.S.C. §317. They must still comply with equal employment

opportunity ("EEO") obligations. MAP Comments at 18. At a bare minimum, therefore, the Commission must apply these public interest requirements to DARS providers.

In any event, the Commission cannot extend the holding of *Subscription Video* to DARS merely because it applies to DBS. The two services are neither technologically nor economically identical. *Subscription Video* noted that "when broadcast services are provided using the facilities of a...common carrier, either the DBS common carrier or the customer-programmer should be regulated as a broadcaster." *Subscription Video*, 2 FCC Rcd at 1005, *citing NAB v. FCC*, 740 F.2d 1190, 1205 (D.C. Cir. 1984). "When both the customer-programmer *and* the common carrier through which the former's signals are carried are immunized from broadcast regulation...the statutory scheme is completely negated." *NAB v. FCC*, 740 F.2d at 1205 (emphasis in original). Yet here, DARS applicants propose to act both as carriers and as programmers. To allow them to evade all broadcasting public interest requirements would run afoul of the *NAB* decision and would frustrate the goals of Communications Act.

B. In The Absence Of Regulations, The Market Will Not Guarantee That DARS Licensees Will Sufficiently Serve The Public Interest.

The Commission has sought comment as to "what public service offerings would not necessarily be provided absent regulatory obligations." *Notice of Proposed Rulemaking,* Establishment of Rules and Policies for the Digital Audio Radio Service in the 2310-2360 MHz Frequency Band, FCC No. 95-229 (released June 15, 1995), at ¶27 ("*NOPR*"). But judging from the comments of the four applicants, it is by no means clear that DARS licensees will provide any public interest programming absent Commission regulations. The applicants have made no solid and enforceable commitments. Instead, they offer vague, ambiguous statements of intent.

For example, Primosphere Limited Partnership ("Primosphere") has stated the obvious -

that it intends to abide by the Commission's EEO requirements for broadcasters and to comply with any intellectual property obligations applicable to broadcasters. Comments of Primosphere Limited Partnership at 35 ("Primosphere Comments"). Yet these are empty promises, since even DBS, which has been given the non-broadcast classification that DARS applicants seek by analogy, must abide by such requirements. *See supra* at 4-5. Primosphere makes no specific promises as to educational, informational, or national affairs programming. Instead, it says it will only "consider the possibility" of devoting a portion of its capacity toward such programming. *Id.*

In one sentence, and with no further elaboration, AMRC has indicated that it intends to include such programming on its system regardless of whether the Commission requires it. AMRC Comments at 23. Yet AMRC's promise is highly ambiguous. It gives no indication of how much capacity it will devote to meeting public interest requirements, or what it believes to constitute public interest programming. CD Radio is similarly ambiguous, and only states that it "will operate consistent with the intent" of the reasonable access and equal opportunities rules and that it intends to hire personnel "without respect to race, religion, national origin, and sex." CD Radio Comments at 84-85. It makes no promises to carry public affairs or educational programming.

Digital Satellite Broadcasting Corporation ("Digital Satellite") shows even more reticence, neither promising nor declaring its intent to carry any public interest programming at all. Instead it merely says that it "expects" that DARS services will develop similarly to cable and DBS, which "because of their distribution structure [sic], offer many channels of public interest programming, *e.g.*, C-SPAN, The Learning Channel, Nickelodeon, etc., without regulatory

intervention." Digital Satellite Comments at 52. But Digital Satellite does not claim that it will provide programming similar to C-SPAN or carry such programming from outside sources. In any event, Digital Satellite is comparing apples to oranges. Cable networks such as The Learning Channel and Nickelodeon are commercially-driven entertainment programmers, which offer shows that may serve the public interest by informing and enlightening. It confuses them with Title III public interest requirements such as coverage of issues of national importance, reasonable access and equal opportunities by candidates, and programming which serves the licensee's community. Finally, cable channels like The Learning Channel and Nickelodeon sometimes pay for access by allowing cable and DBS systems to keep part of their subscription fee. This is something which not all public interest programmers and programs could afford - nor should they have to.

C. *Daniels Cablevision* Does Not Pose An Obstacle To Imposing Public Interest Obligations.

Several commenters have opined that imposition of any public interest obligations would be "constitutionally problematic" in light of *Daniels Cablevision v. United States*, 835 F.Supp. 1 (D.D.C. 1993), *app. pending sub nom., Time Warner Entertainment Co. v. FCC*, No. 93-5349 (D.C. Cir. filed Nov. 11, 1993). Comments of the National Association of Broadcasters at 52 ("NAB Comments"); Digital Satellite Comments at 52; Primosphere Comments at 36. AMRC notes that constitutional questions are raised, but only to the extent that they are imposed on subscription, not advertiser-supported, services. AMRC Comments at 23. CD Radio questions whether public interest requirements are constitutional even on advertiser-supported DARS services. CD Radio Comments at 84 n. 202.

But these arguments simply do not stand up to closer analysis. As a preliminary note,

MAP observes that the D.C. Circuit's review of the District Court's opinion is still pending. Since it may be reversed on appeal, it is of dubious value in guiding the Commission's decision.

Moreover, ***the Commission itself*** has argued in the *Daniels* appeal that the case was wrongly decided and that the set-aside at issue in that case is fully compatible with licensees' First Amendment rights. *See* MAP Comments at 20; Opening Brief for the FCC and the United States at 49-51, *Time Warner v. FCC*, No. 93-5349 and consolidated cases (D.C. Cir. 1995).

Whatever the outcome of that proceeding, MAP has shown in its Comments that *Daniels* is a very narrow holding, and it would not apply to public interest requirements in the case of DARS. In the first place, the provisions of Section 25 of the 1992 Cable Act which impose reasonable access and equal opportunity requirements on DBS were not challenged in *Daniels* and are presumptively valid.

Moreover, in summarily dismissing the DBS noncommercial, educational programming set-asides contained in Section 25, the *Daniels* Court applied the *O'Brien/Ward* scrutiny used for content-neutral regulations.[2] It found that the regulations did not meet that standard because there was no evidence on the record which established that these set-asides were "necessary to

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[2]*Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1969). For example, see *Turner Broadcasting v. FCC*, 114 S.Ct. 2445, 2469 (1994), where the Supreme Court applied "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." Under this standard, a content-neutral regulation will be sustained if:

> it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

serve any significant regulatory or market-balancing interest." *Daniels*, 835 F.Supp. at 8. *C.f.* Comments of National Public Radio, Inc. at 5.

The Commission, however, has the opportunity in this proceeding, and in any subsequent proceedings it may choose to commence, to build such a record.[3] Thus it can avoid the objections which *Daniels* raised concerning the DBS set-asides. It is undeniable that the government has a significant interest in promoting such goals as discourse on political and civic issues, programming which meets the needs of children, and reasonable access and equal opportunities for candidates for national office. These goals have repeatedly been found to pass constitutional muster, and MAP has already added evidence to that record which shows that they would not be met in the absence of Commission regulations. *See supra*, at 5-7; MAP Comments at 19-20.[4]

D. The Commission Should Adopt A "Promise-Versus-Performance" Approach, But Should Do So Consistently For All Programmers Who Use Scarce Electromagnetic Spectrum.

Finally, MAP strongly supports the National Association of Broadcasters' ("NAB") suggestion that the Commission use a "promise-versus-performance" approach to ensure that

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[3]CD Radio suggests that "[b]ecause no such record has been compiled," a public interest requirement would be constitutionally infirm. CD Radio Comments at 84 n. 202. This argument puts the cart before the horse. The very point of soliciting comment on these issues in this rulemaking is to build a record which establishes a government interest.

[4]Citing *Daniels*, CD Radio makes the audacious suggestion that the political broadcast laws are a "content-based burden" on speakers that would fail under First Amendment scrutiny. CD Radio Comments at 84 n. 202. This proposition, of course, runs contrary to long established Supreme Court precedent that has upheld these laws as essential to "the right of the public to receive sutiable access to solical, political, esthetic, moral and other ideas and experiences...." *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1967); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981). Moreover, as discussed *supra*, the District Court judge in *Daniels* invalidated a noncommercial educational set-aside for DBS, not the application of the political broadcast laws as extended to DBS in 47 U.S.C. §335.

DARS licensees live up to their pledges of benefitting the public through offerings to rural listeners, non-English speaking audiences, and programming to minority and ethnic groups. NAB Comments at 51-52. Specifically, the NAB proposes that each licensee include a statement in its initial application, to be supplemented annually, wherein each licensee lists the programming it has offered and makes concrete and specific promises concerning the minority, ethnic, and niche programming it intends to provide. *Id.* at 52.

Of course, it is highly ironic that the NAB should suggest that the Commission take a promise-versus-performance approach to DARS licensees. For years, the NAB has opposed the use of programming inquiries in the broadcast licensing context. NAB's support in this instance only indicates that in their hearts, broadcasters know that this is the best way to ensure that the public's airwaves are used in a way that best serves the public's interests. Only their pocketbooks prevent them from admitting that the Commission should take this approach to ***all*** program services which use the public spectrum. As the trustee of the spectrum, the Commission should apply the same logic to any and all program services which use this valuable and scarce resource to deliver entertainment and information.

II. DARS LICENSEES MUST NOT BE ALLOWED TO HOARD SPECTRUM BY OBTAINING GREATER ALLOCATIONS THAN ARE NECESSARY TO PROVIDE SERVICE OR BY PURCHASING COMPETITOR'S ORBITAL SLOTS AND FREQUENCY ALLOCATIONS, AND SHOULD USE SPECTRUM TO PROVIDE PROGRAMMING, NOT ANCILLARY, SERVICES.

Several Commenters have made proposals which could ultimately result in their stockpiling spectrum and using it for purposes other than providing DARS service. The Commission must be vigilant to prevent this result.

As MAP has pointed out, spectrum is a scarce and valuable resource, and it is of para-

mount significance to adopt policies which do not allow parties to waste, squander, or hoard it. MAP demonstrated in its Comments that the scarcity of the electromagnetic spectrum "remains the fundamental principle which guides spectrum allocation." MAP Comments at 14, *citing Turner Broadcasting v. FCC*, 114 S.Ct. 2445 (1994); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). The value of the spectrum has been demonstrated time and again. For example, committees of both houses of Congress have acknowledged its highly valuable nature by proposing to raise billions of dollars from spectrum auctions, and by declaring their policy goal of seeing that the public ultimately reaps benefits from its use. *See, e.g.*, Christopher Stern, House committee defuses threat of second-channel auction, *Broadcasting & Cable*, Sept. 18, 1995, at 6. Last fall's successful PCS auctions, which raised $7 billion, are another, unequivocal indication of the value which the market places on spectrum use. *See, e.g.*, FCC Auction for PCS Licenses Ends With Proceeds Topping $7 Billion, *Communications Daily*, March 14, 1995, at 1-2.

In light of this value, it would be a scandalous misuse of the public airwaves if the applicants seeking to provide DARS service could use their applications to obtain - free of charge - "beachfront property" spectrum which they use for non-DARS purposes. The Commission must ensure that spectrum licensed to DARS providers goes to providing DARS service and only DARS service. MAP urges it to adopt several measures to achieve this.

A. Licensees Should Only Receive Enough Spectrum To Provide A Viable DARS Service.

The DARS applicants speak in unity responding to the Commission's request for information concerning the amount of spectrum necessary to ensure that they can provide an

"effective and economically viable" service. They want it to allocate the entire S-band block, in 12.5 MHz slots, and only to the four existing applicants. *See* AMRC Comments at 25; CD Radio Comments at 7-11; Primosphere Comments at 19; Digital Satellite Comments at 37.

The applicants' estimates must be treated as highly suspect because even though they speak as one voice, they are short on facts. Three applicants argue fervently that 12.5 MHz would provide no more than 30 to 40 CD-quality channels, and that these channels are necessary to "ensure sufficient channel capacity to support these systems." Primosphere Comments at 17. *See also* Digital Satellite at 35; AMRC Comments at 25. But their arguments are unsupported by any statistics or facts. CD Radio submits a supporting study, yet it is of questionable value in light of the company's previous estimates[5] and because it was not performed by a disinterested party.[6] CD Radio Comments at Appendix B.

As is the case for any evolving service technology, these requirements are not written in stone. Various applicants have admitted that there is still a great deal of uncertainty as to the data rate that will be necessary to provide CD-quality sound, AMRC Comments at 25, or whether consumers will even demand CD-quality sound. CD Radio Comments at 93 n. 216. This uncertainty as to the required data rates and sound quality means that there is flexibility in the applicants' spectrum requirements.

The malleability of the applicants' requirements is further demonstrated because their current estimates differ so greatly from their previous estimates. For example, although CD

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[5]CD Radio's earlier estimates said that it could provide almost the same number of channels using under *two-thirds* the bandwidth. See discussion *infra* at 12-13.

[6]The engineer who performed the CD Radio study, Robert Briskman, is the company's Director and Chief Technical Officer.

Radio now claims that it requires 35 channels and 12.5 MHz, its original estimates included 30 channels occupying only 8 MHz. Comments of CD Radio, *DARS Allocation Proceeding*, Gen. Docket No. 90-357, Appendix 1 at 4. As the NAB has noted, AMRC and Loral Aerospace Holdings suggested three years ago that their needs could be fulfilled in 5 or 6 MHz. NAB Comments at 60 n. 140. Finally, as the Commission observed in the *NOPR*, the applicants' recent estimates differ widely, with channel capacity ranging from 11 to 32 channels, and spectrum needs from 10 to 50 MHz. *NOPR* at ¶31. The Advanced Television ("ATV") Grand Alliance has estimated that terrestrial ATV technology could provide as many as 75 CD-quality audio channels in only 6 MHz. *NOPR* at ¶31. It seems, therefore, that applicants are expanding their demands for spectrum, even though one could reasonably expect that technology advances would decrease, not increase, the spectrum needed.

The Commission should treat these estimates with a great deal of skepticism. That the four applicants now approach the Commission with a uniform plan should raise suspicion. That this plan gives each of them the maximum amount of spectrum available without triggering spectrum auctions should raise even more suspicion.

Indeed, the Commission should not take the applicants' word for it, but should conduct its own study. It has developed significant expertise in assessing the technological requirements of new and existing services. There is no reason why it should not use its expertise here. At the very least, the Commission should rely on technological assessments only if made by outside, disinterested parties.

B. If One DARS Applicant Drops Out, The Commission Should Not Allow Other Licensees To Purchase Its Orbital Slots And Frequency Assignments.

MAP concurs with CD Radio's belief that "licensees should not be permitted to acquire

spectrum from other DARS licensees." CD Radio Comments at 18. Otherwise, CD Radio claims, one licensee could have control over half the spectrum, which would place the other licensees at a serious competitive disadvantage. *Id.* Furthermore, it notes, allowing buyouts would be inequitable to other parties that may become interested in entering the DARS market. "Aggregation would significantly diminish the chances for prospective entrants." *Id.* at 20.

Preventing licensee buyouts of another licensee's orbital slots and frequency allocations will ensure that there remain four operating, competing DARS providers. While MAP leaves it to other parties to determine how many providers will bring about healthy competition, it goes without saying that four viable competitors are better than three.[7] Healthy competition will not only provide lower subscription rates for the listening public, but it will more greatly ensure the diversity of programming voices among DARS service.[8] As Chairman Hundt recently stated, "No one should be able to monopolize the [DARS] spectrum....The results of competition will be better radio service for the American Public." Reed E. Hundt, Radio Mergermania and The Price of Overconcentration, at 3, (speech by FCC Chairman Hundt to the NAB Radio Show, Sept. 8, 1995).

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[7]It is equally obvious that more than four competing providers would be even better. As the NAB notes, "There is no sound policy reason that the universe of satellite DARS providers should be limited to four favored applicants..." NAB Comments at 54. Yet this would rely on a determination that viable service could be provided with less than 12.5 MHz. See discussion *supra* at 11-13.

[8]On a similar note, if any additional spectrum is allocated to DARS service, it should not automatically go to the existing applicants. Instead, the Commission should seek to encourage new entrants on a competitive bidding or comparative licensing basis. Thus, the Commission should reject the suggestion of applicant Primosphere that if any license should be canceled, the usable bandwidth should be divided pro-rata among the remaining applicants. Primosphere Comments at 43.

Moreover, in light of the DARS applicants' desire not to reopen the application process, any suggestion that the incumbent applicants should be permitted to consolidate is outrageously anticompetitive. This lethal combination will foreclose new market entrants and opportunities for new voices both now and in the future.

C. Licensees Should Not Be Allowed To Provide Ancillary Services.

Several Commenters have argued that they should be allowed to provide ancillary services via DARS systems in addition to audio programming. These services might include data transmission, voice communication, paging, and geographic information. *See NOPR* at ¶29. For example, CD Radio urges that the Commission allow DARS licensees to offer ancillary services following the permissive DBS regulatory model set forth in *United States Satellite Broadcasting Company, Inc.*, 1 FCC Rcd 977 (1986), *recon. denied*, 2 FCC Rcd 3642 (1987) *("USSB I")*. CD Radio Comments at 85-87.[9]

If the applicants get their wish on this issue, they will have struck the deal of the century. They will have obtained 12.5 MHz of spectrum for free while other parties pay auction prices. Their justification in doing so would be to provide audio programming service to underserved

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[9]CD Radio cites three other historical examples, yet not one of them carries any weight. First, it relies on the Commission's decisions to permit digital transmission of administrative messages on aeronautical enroute frequencies, *Digital Administrative Communications in the Aviation Service*, 60 RR2d 1313 (1986), and to allow cellular providers to offer fixed services. *Westcom Products, Inc.*, 102 FCC2d 470 (1985). *See* CD Radio Comments at 86 n. 206. Yet these ancillary services did not threaten the quality of the primary service. Diverting the spectrum to uses other than the primary use did not reduce the number of channels or the fidelity of the signal, but merely reduced the capacity of calls which could be made. The other example CD Radio relies upon, *Fourth Further Notice of Proposed Rulemaking*, Advanced Television Systems, FCC No. 95-315 (released Aug. 9, 1995) at ¶4, is far from a final decision. Instead, it is just a discussion of the technological possibilities of digital broadcasting. Comments have not even been filed in the proceeding.

tastes, populations, and locations. Yet they would use part of their spectrum for nationwide paging, data, and voice mail communications which, although possibly more lucrative to the applicants, do not provide any public interest benefits.

Despite CD Radio's argument, the Commission is not required to follow the precedent set by *USSB I*. In that case, the Commission was responding to a petition for declaratory ruling filed by a DBS licensee which sought to clarify language in early DBS orders indicating that DBS facilities could be used on a secondary basis for purposes other than transmission of direct-to-home video programming. *USSB I*, 1 FCC Rcd 977 (1986). The Commission found that provision of ancillary offerings was allowable, subject to certain important safeguards.[10] Crucial to the Commission's opinion in *USSB I* was the determination that the "high cost of building DBS satellite capacity simply makes it an economically uncompetitive means to provide" these services. *Id.* at 979. Therefore, it found, there was little risk that the ancillary services would "detract from the goal of introducing DBS service" or would prevent "the maximum allowable usage of the DBS allocation." *Id.*

Therein lies the reason that the Commission cannot give DARS operators the same flexibility they gave DBS: times, and especially markets, change. Since 1986, market demand for paging, data transmission, and mobile voice communication has increased considerably. Thus

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[10]The Commission designed these "temporal restrictions" to "minimize the possibility of a party applying for DBS facilities with the primary purpose of providing" ancillary services. *USSB I*, 1 FCC Rcd at 979. It imposed a requirement that any DBS operator which provides non-DBS service must initiate DBS service during its first five-year license term. *Id.* Thereafter, a DBS operator may continue providing non-DBS service for the remainder of the life of its first satellites, provided that the non-DBS use cannot exceed fifty percent of each 24 hour day on each transponder. *Id.* The Commission indicated that it would reexamine the propriety of allowing non-DBS use at the end of the first generation of DBS satellites, and would consider reallocation of the DBS band if it was underutilized for "conforming" uses. *Id.* at 979 n. 9.

the financial rewards are much greater, and it is more likely that DARS licensees will devote a large amount of their capacity to these services. As an example of how lucrative such services can be, the NAB's President has stated that local television's ability to provide digital services such as voice, paging, and data delivery - using less than half the bandwidth that would be controlled by each DARS licensee - is "the only way broadcasters will be able to compete in tomorrow's marketplace." Kim McAvoy, Congress sees gold in them thar second channels, *Broadcasting and Cable*, April 10, 1995, at 23. *See, e.g.*, Gigi B. Sohn and Andrew Jay Schwartzman, *Pretty Pictures or Pretty Profits: Issues and Options for the Public Interest and Nonprofit Communities in the Digital Broadcasting Debate*, Benton Foundation Working Paper (Pre release draft, on file with Media Access Project) at 3-4.

Similarly, even though *USSB I* found that the high start-up costs made it economically uncompetitive for DBS licensees to launch satellites only to provide ancillary services, the DARS applicants here may be contemplating an entire package of services - both DARS and ancillary. Also, although providing ancillary services via satellite remains expensive, it may no longer be "economically uncompetitive" because the operating costs of provision via terrestrial-based systems have also risen. For example, to provide PCS service to just one locality, the license alone can cost as much as $493.5 million (for a recently-auctioned Los Angeles license). *See, e.g.*, FCC Auction For PCS Licenses Ends With Proceeds Topping $7 Billion, *Communications Daily*, March 14, 1995, at 1. To piece together a mosaic of 29 local licenses (out of 99 offered) cost one company $2.1 billion. *Id.*

Finally, as was not true in *USSB I*, the amount of bandwidth per license has not yet been defined for DARS licenses. This suggests the possibility that applicants could inflate their

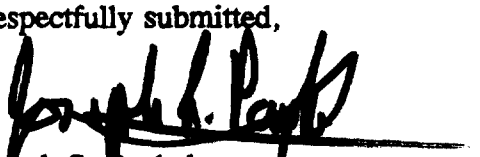
estimates of the spectrum requirements for DARS service in hopes of acquiring more spectrum for ancillary services.

In any event, if the Commission does allow DARS licensees to provide ancillary services, it should at a bare minimum establish a procedure to recapture for the public some of the value of the public spectrum and to prevent unjust enrichment of the licensees. This could include creation of a license fee following, for example, the procedures set forth in H.R. 1555, 104th Cong., 1st Sess., §301, with some of the money directed toward public interest uses.

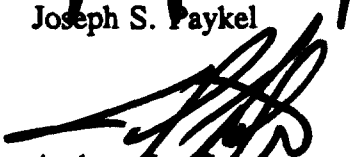
CONCLUSION

The Commission's statutory mandate requires that it extend Title III public interest requirements to DARS applicants, or at the very least that it create broadcast-style programming obligations. Moreover, the Commission must beware of any attempts at "spectrum grab." For these reasons, the Commission should adopt the specific public interest requirements and spectrum allocation policies suggested above.

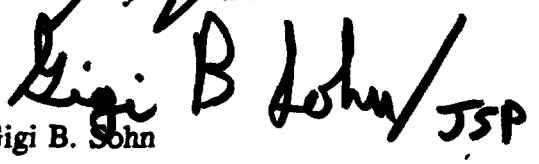
Respectfully submitted,



Joseph S. Paykel



Andrew Jay Schwartzman



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